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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1566

IOWA STATE MEN'S REFORMATORY AND
MICHAEL V. REAGEN, PH.D.,
Commissioner, Iowa Department of Social Services,
Petitioner,

v.

CYNTHIA GUNTHER,
Respondent.

BRIEF OF RESPONDENT, CYNTHIA GUNTHER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent, Cynthia Gunther, respectfully prays that a writ of certiorari be denied, and that this Court decline to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 11, 1980. Petition for rehearing was denied on February 5, 1980.

INTRODUCTION

Respondent, Cynthia Gunther, accepts the Petitioners' statement of jurisdiction, the question presented, the statute involved, and the statement of the case, in this matter.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY CONSTRUED *RES JUDICATA* AND COLLATERAL ESTOPPEL IN REACHING THE MERITS OF CYNTHIA GUNTHER'S CLAIM.

Both the District Court's consideration of the facts independently in light of Federal law (Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000(e), et seq.), or the Court of Appeals' consideration of the facts and the Federal law, upon the understanding that no State tribunal was given jurisdiction to hear the discrimination claim based on the Federal statute, provide justification for the decision by both, that *res judicata* is inapplicable. Petitioners are correct that the record utilized by the Federal Court was made before the State Commission (Merit Commission) and the State Court. But as both opinions note, Cynthia Gunther was jurisdictionally precluded from raising Title VII claims before the Merit Commission, the Iowa District Court, or the Iowa Supreme Court, and, because of that jurisdictional preclusion, none of those decision-making

bodies, including the Iowa Supreme Court decision which Petitioners now assert is *res judicata,* address the issue of Title VII, and the bona fide occupational qualification provided thereby.

The Petitioners suggest that Cynthia Gunther, if dissatisfied with the opinion of the Iowa Supreme Court, could have and should have appealed to this Court pursuant to the *Montana* decision (*Montana v. United States,* 440 U.S. 147 (1979)). A review of the Iowa Supreme Court opinion (Appendix C, Petitioners' Petition for Writ of Certiorari, p. 34), indicates that only a vague reference was made to 42 U.S.C. §2000(e), and certainly, in no conceivable statement of the legal principles involved in that case, could it be said that the decision answered either negatively or affirmatively, the applicability of 42 U.S.C. §2000(e).

Under established doctrines of *res judicata*, neither the issue of the applicability of 42 U.S.C. §2000(e), et seq., to the facts as found by the Merit Commission of Iowa, nor the opportunity to present those facts to any forum having jurisdiction thereover, was given to Cynthia Gunther. Petitioners assert on page 6 of their Petition for Writ of Certiorari, that Respondent should not be permitted to "forum shop when dissatisfied with the holding of the state Supreme Court". A careful reading of the Iowa Supreme Court opinion (Appendix C), will indicate that no appeal to the United States Supreme Court was possible, in that that decision was based exclusively on State law. The only opportunity for Cynthia Gunther to pursue Federal claims was in the Federal forum. In none of the actions subsequent to the Merit Commission decision in her favor, was she the dissatisfied party, and the appellant. The forum was chosen by the Petitioners, not Cynthia Gunther. She was jurisdictionally precluded from raising her Federal claims.

> "Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discriminations." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974), cited by the United States Court of Appeals for the Eighth Circuit in its decision (Appendix A, Petitioners' Petition for Writ of Certiorari, p. 12).

Petitioners allege opposite results in an attempt to induce certiorari. The only case finding a *res judicata* effect is *Sinicropi v. Nassau County,* 601 F.2d 60 (2d Cir. 1979), which holds such an effect should be given to prior State Court proceedings where the plaintiff chose to submit a State agency decision to review by State Courts. That is simply not the case here. Title VII, and its effect and implications for the fact situation before this Court, were never presented to a State agency. Neither State merit law, nor State civil rights law, was reviewed by the Iowa Court. *Sinicropi* is therefore inapplicable. Elimination of *Sinicropi* makes consistent all Federal determinations that Title VII claims may be litigated, and that *res judicata* and collateral estoppel have no effect. (Petitioners' Petition for Writ of Certiorari, p. 14, and cases cited therein.) Either, under controlling precedent, *res judicata* and collateral estoppel are inapplicable to Title VII proceedings, or, if applicable under general principles of *res judicata*, Cynthia Gunther has not had the opportunity, nor has she presented her Title VII claims to a forum having jurisdiction thereof, and therefore, *res judicata* is inapplicable to the decision of the Iowa Supreme Court. Petitioners urge *Montana v. United States, supra,* but that case also provides support for Cynthia Gunther's position, in that the Court, in *Montana,* stated that the application of collateral estoppel depended on three factors: (1) whether the issues presented in the Federal litigation are in substance the same as those resolved in the State Court (which they were not); (2) whether controlling facts or legal principles have changed significantly since the State Court judgment (which they have, for Title VII was never litigated); and (3) whether other special circumstances warrant an exception to the normal rules of preclusion (which was the view of the Court of Appeals; Appendix A, p. 16, n.7).

II.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT THE IOWA STATE MEN'S REFORMATORY HAD FAILED TO DEMONSTRATE A BONA FIDE OCCUPATIONAL QUALIFICATION LEGALLY SUFFICIENT TO PRECLUDE CYNTHIA GUNTHER FROM PROMOTION.

Contrary to the assertion of the Petitioners, this case does not involve issues of national interest, either as to bona fide occupational qualification under Title VII, or as an unwarranted extension of *Dothard v. Rawlinson,* 433 U.S. 321 (1977). Petitioners have once again misconstrued the results reached by the Iowa District Court, the United States District Court, and the Court of Appeals for the Eighth Circuit, ignored their suggestions for remedy to both

horns of the dilemma, but instead, have elected to pursue this appeal. It must be remembered that Cynthia Gunther's complaint under Title VII, affirmed by both the District Court and the Court of Appeals, is not that certain job functions, because of prison security and inmate privacy, are subject to bona fide occupational qualifications. Her complaint is specifically that the promotional ladder has been foreclosed to her.

> "By upholding plaintiff's claim in the present action, we are not holding that Anamosa could not possibly create a bfoq exception relating to some job functions for correctional officers at the men's reformatory. A proper classification narrowly drawn . . . may satisfy a bfoq . . . We need not decide that question. What we do hold is that Anamosa's current classification system violates Title VII because it impermissibly attempts to establish a bfoq which has the effect of prohibiting any advancement in a person's chosen field beyond a CO I level because that person is a woman." *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir. 1980); Appendix A, Petitioners' Petition for Writ of Certiorari, p. 21.

This Court need not grant this petition for certiorari in order to provide a remedy to these Petitioners. That remedy has already been suggested, thrice over.

> "We do not have the IMEC (Iowa Merit Employment Commission, State of Iowa) as a party to this litigation, and Justice Reynoldson's (Chief Justice, Iowa Supreme Court) is not an option available to us. As a practical matter, however, it would appear possible to resolve this controversy by reclassifying the job descriptions giving consideration to the factors enumerated in Justice Reynoldson's dissent." *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir. 1980); Appendix A, Petitioners' Petition for Writ of Certiorari, p. 22, n.9.

Gunther is not an over-extension of *Dothard.* Both the District Court and the Court of Appeals distinguished *Dothard* on the basis of a factual distinction. The prison system described in *Pugh v. Locke,* 406 F.Supp. 318, 323-325 (M.D. Ala. 1976), *modified in part,* 559 F.2d 283, *cert. granted,* _____ U.S. _____, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978), is not found in Anamosa, Iowa. However, "(A)lthough *Dothard, supra,* is distinguishable on the basis of difference between prison conditions and inmate populations in Alabama and Anamosa, it provides an analytical framework for assessing the profferred bfoq in this case". *Gunther v. Iowa State Men's Reformatory,* District Court opinion, McManus, Edward; Appendix B, Petitioners' Petition for Writ of Certiorari, p. 26.

Both the District Court and the Court of Appeals utilized *Dothard,* without an extension of same, but in applying the balancing test prescribed by *Dothard* to the factual situation at Anamosa, and the classification system offered by the Petitioners, which classification system they have consistently refused to modify, and found Petitioners' arguments wanting.

> "In addition to showing that the hiring of women at Anamosa would undermine the essence of the prison administration, Anamosa must also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates and the non-discrimination principle of Title VII." *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079 (8th Cir. 1980); Appendix A, Petitioners' Petition for Writ of Certiorari, p. 20.

There are women who have been promoted to Correctional Officer II at the Iowa maximum security men's penitentiary at Fort Madison, who perform limited duties. The same job description applies. The same officials who operate Fort Madison, operate Anamosa, but stubbornly refuse to admit that the classification is subject to Title VII.

CONCLUSION

For all of the foregoing reasons, Cynthia Gunther respectfully requests that a writ of certiorari be denied, and that the judgment and decision of the United States Court of Appeals for the Eighth Circuit in this case be allowed to stand.

Respectfully submitted,

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